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IN THE

Supreme Court of the United States

October Term, 1965

No. 368

A book named "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", G. P. PUTNAM'S SONS (Intervenor),

Appellant,

vs.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

Appellee.

On Appeal From the Supreme Judicial Court of Massachusetts.

Motion for Special Leave to File and Supplemental Brief of Amicus Curiae Citizens for Decent Literature, Inc., an Ohio Corporation, in Reply to Appellant's Supplemental Brief.

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When this Court on November 8, 1965 noted probable jurisdiction in the case herein and advanced the same for hearing with two other obscenity cases, set for oral argument on the summary calendar for the week of December 6-9, the regular schedules for filing of briefs, as provided for in Rules 41.1, 41.2 and 41.3 of the Revised Rules of the Supreme Court of the

*Citizens for Decent Literature Inc., is referred to hereinafter and in the Supplemental brief as "Amicus Curiae C.D.L".

United States, were abridged as provided for in Rule 41.4 of said rules.

On the final day of oral argument on Dec. 8, 1965, appellant's counsel herein orally requested and was granted leave of court to file a supplemental brief replying to the brief of *amicus curiae* C.D.L., which appellant had received only a few days prior to the argument. Appellant's supplemental brief was received on December 17, 1965, and for reasons stated hereinafter, *amicus curiae* C.D.L. feels it necessary to reply to the arguments made by appellant in such brief.

Amicus curiae C.D.L. has, heretofore, filed briefs in each of the three obscenity cases heard by this Court on December 7 and 8, 1965. Said briefs were in support of the People's causes, but differed from the position urged by the federal and state attorneys in their briefs.

In its briefs, *amicus curiae* C.D.L. views the test approved by this court in *Roth-Alberts,* 354 U.S. 476, 77 S. Ct. 1314, 1 L. Ed. 2d 1498 (June 24, 1957) as a definition of the balance between the constitutional rights of an individual under the first amendment, and the constitutional rights of the government under its exercise of recognized police powers. Simply stated, the balance is: Matter whose dominant theme taken as a whole presents an appeal to prurient interest, is matter which is utterly without social importance. Accordingly, such matter is subject to proscription under the police power. *Amicus* also sees in the *Roth-Alberts* majority opinion an acceptance of the "balancing" approach utilized in prior case law, represented in the A.L.I. Model Penal Code (1957

draft) and explained by the reporter's comments thereto.

Under this view, the factual determination of obscenity at the trial level, *i.e.*, whether the dominant theme of the material taken as a whole is to prurient interest, necessarily entails this same "balancing" operation, which weighs the balance between the personal right of an individual to speak with candor on sexual matters and the governmental right of the community to maintain what it regards as proper standards of public morality by proscribing pruriency. Similarly, review by this court, after a fact finding of obscenity, also entails a review of the same "balancing" to assure that the balance struck below was reasonable, *i.e.*, presented a jury question.

On the other hand, the defense attorneys view the same test as requiring the application of three separate and independent tests for prurient interest, social value, and patent offensiveness, and permitting proscription under the police powers *only* if all three tests are met. Strangely to *amicus curiae* C.D.L., the government attorneys are willing to agree, with the Attorney General of the Commonwealth of Massachusetts going so far as to say that it is possible to have material whose predominant appeal is to prurient interest which is not proscribable under the federal power or state police powers reserved to the States under the 9th and 10th Amendments. (Brief of the Attorney General of the Commonwealth of Massachusetts, p. 17.)

Amicus curiae C.D.L. viewed the failure of government (1) to pursue the "balancing" argument and (2) to address itself to the historical importance of the police power in this area, in support of the "balancing"

operation, as a weakness in the people's presentation. In our opinion, this retreat to three separate and independent tests constitutes an unwarranted abandonment of historic case law, both in the courts below and in this Court. By written motion *amicus curiae* C.D.L. requested leave to participate in argument on these matters, but the Motion was denied.

Appellant's supplemental brief attacks several aspects of the brief of *amicus curiae* C.D.L., which presented to this Court the above and other matters, not found in the government's brief. In order to answer to this court's satisfaction several questions which are presented, we therefore find it necessary to reply to appellant's arguments, and respectfully move at this time pursuant to Rule 41.6 for special leave of Court to file a supplemental brief in reply to Appellant's Supplemental brief.

Respectfully submitted,

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I.

Emerging Concepts Like "National Standards" and "Independent Constitutional Judgment", and the Possible Binding Effect of This Court's Rulings Make Consideration of Matters Outside the Record a Matter of Basic Fairness to Other State Governments Which Were Not Represented in the Trial Court Proceedings.

Appellant states, "The C.D.L. brief contains much that, under the most tolerable standards, is not proper-

ly part of a brief." (Supplemental Brief, p. 3). The objection, of course, is based upon the traditional notion that an appellate court will not go outside the trial record in considering matters on appeal. We submit, however, that undesirable as such practice may be, the People's cause is forced in that direction through the turn of events, which has recently taken place in this Court's review of obscenity cases. The inroads being made by emerging concepts, such as "national standards" and "independent constitutional judgment", and the binding effect that such Supreme Court judgments may have on the police power of other state governments which were not a party to the trial below, make any limitation on appeal to the evidence appearing in the record unfair to the People's cause.

A. To Limit Argument to Matters in the Record Will Work an Injustice on State Governments Whose Interests Were Not Represented in the Trial Court, if They Are to Be Bound by the Result Reached by This Court.

This Court's review of the Massachusetts *Fanny Hill* case is not simply the review of *a* case which affects *only* the Attorney General of the Commonwealth of Massachusetts in relation to his enforcement of the obscenity laws of Massachusetts. Appellant seeks not only to overthrow the judgments of the trial and appellate courts of Massachusetts that Fanny Hill may not be distributed within the confines of their jurisdiction, but also asks for the right to distribute Fanny Hill in all other jurisdiction (Supplemental Brief, p.

11). The result reached here may affect[1] every city and town in this nation which has, in combating the ever increasing flood of pornography, been successful thus far, either through prosecution or threat of prosecution, in keeping the book out of its candy stores, liquor stores and drug stores. The State's Attorney and the People of Illinois[2] have an interest, the Attorney General and the People of Rhode Island[3] have an interest, the County Prosecutor and People of New Jersey[4] have an interest, as do other governments whose cases have not yet reached the court room.[5]

Appellant may consider it inappropriate to argue matters which are outside the record, but *amicus* submits that the people of this nation cannot afford to rest

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[1]C.D.L. believes, however, that this Court's decision should not have such an effect. See XL, Notre Dame Lawyer, at page 10, where the author comments, "If the suggestion here advanced were adopted by the Supreme Court, it would follow that what is obscene in one State might not be in another. Why not?"

[2]*People of the State of Illinois v. Paul Romaine* (Unreported, in the Circuit Court of Cook County, Department ...., Criminal Division). Defendant held to have violated the Illinois obscenity statutes.

[3]*J. Joseph Nugent, Attorney General of the State of Rhode Island v. A Book Entitled "Fanny Hill, Memoirs of a Woman of Pleasure" by John Cleland* (Unreported, State of Rhode Island and Providence Plantations, Superior Court, M. P. No. 6467). Book held to be obscene in a temporary restraining order proceeding.

[4]*G. P. Putnam's Sons, a corporation v. Guy W. Calissi, Bergen County Prosecutor* (86 N.J. Super. 82, 205 A. 2d 913). Book held to be obscene in a trial court action.

[5]For example, we are informed by the Executive Secretary that the State Literature Commission of Georgia has instructed that an action be brought to enjoin its distribution in Georgia. In other areas, the book has been kept from distribution by threat of prosecution.

their police power upon what the Attorney General of the Commonwealth of Massachusetts, as prosecutor, is willing and able to put forward in the matter of evidence at the trial.[6]

B. Matters Outside the Record Are Essential for the Enlightenment of Those Justices Who Adhere to an "Independent Constitutional Judgment" Type of Review.

The reference materials objected to by Appellant are proper in the event individual members of this Court decide they are not bound by the "sufficient evidence" rule and instead, elect to exercise an "independent constitutional judgment" in their review.[7]

In the view of C.D.L., as expressed in its brief (Amicus Brief, p. *72 et seq.*), the review exercised by this Court, no matter what its scope may be, is one of balancing, which considers both the rights of individuals to speak, as guaranteed by the First Amendment, and the right of government to exercise its police powers so as to maintain the moral climate of the community, as reserved to the states and guaranteed by the Ninth and Tenth Amendments.[8] The *Roth* test defines the balance reached. As noted by Justice Learned Hand

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[6]In jury trials, the only evidence for the People in most instances may be the subject matter or the conduct itself.

[7]We submit, however, that an "independent constitutional judgment" is an unwarranted encroachment upon the fundamental right of a community to trial by jury, and its own determination of basic questions of fact in this area. See XL, Notre Dame Lawyer, Page 3, *et seq.*

[8]Appellant, on the other hand, does not see such a balancing. To Appellant, argument pointing up the social interest in order and morality is irrelevant, if under *any* circumstance *some slight* social value can be shown.

in "The Bill of Rights", Harvard University Press at page 63:

> "So far as appears from these decisions, it is for the legislature to determine what are the not 'impermissible limits' by *balancing* the evil of those lustful emotions that the language may excite *against* depriving the author and his audience of the benefit of what he had to say. . . ." (Our emphasis.)

It seems eminently unfair for this Court or any other reviewing court to consider some facts not within the purview of the record being reviewed, as an "independent constitutional judgment" upsetting the lower court judgment necessarily entails, and not consider in the balance other facts which are also outside the record but which are available to support the judgment.

Since the state's police power in aid of the general welfare is an interest which is entitled to constitutional protection, and a factor to be considered in this balancing process, it would appear that the judgment of any justice of this Court exercising an "independent constitutional judgment" should not be impaired by limiting his vision to such evidence as was presented before the trial court. In many instances (particularly in jury cases) the only evidence before the trial court in support of the People's case may be the subject matter or conduct itself. He should have before him the knowledge of all contemporary facts and arguments which can be marshalled to support the lower court's decision which was rendered in favor of the police power.

C. Matters Outside the Record Are Essential for the Enlightenment of Those Justices Who May Adhere to a "National Standards" Method of Review.

The essential need for informing this Court of matters outside the record[9] was recently made apparent by the principles expressed in the opinion of Justice Brennan, concurred in by Justice Goldberg, in *Jacobellis v. Ohio,* 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793. In our opinion the "national standards" concept of review expressed at page 1682:

> ". . . We thus reaffirm the position . . . that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. . . .
>
> ". . . The film was favorably reviewed in a number of national publications, although disparaged in others, and was rated by at least two critics of national statute among the best films of the year in which it was produced. It was shown in approximately 100 of the largest cities of the United States, including Columbus and Toledo, Ohio. We have viewed the film, in the light of the record it made in the trial court, and we conclude that it is not obscene within the standards enunciated. . . ."

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[9]Even though this Court may refuse to take judicial notice of such facts, as being outside the record, such avowals of amicus may still function as argument to raise a question in this Court's mind as to whether it possesses the qualities of a seer which seem necessary for any evaluation of "national standards." See, "The Bill of Rights" by Learned Hand, Harvard University Press, pages 72, 73.

opened Pandora's box,[10] so far as the orderly process of obscenity trials is concerned.

What is to be the fate of a case where the overburdened city, county or state prosecutor does not lay before the trial court the police actions taking place throughout the nation and the results in other obscenity trials dealing with the subject matter? Clearly such matters are relevant if the review is to follow the so-called "national standards." On a constitutional issue, is this Court to be bound by an incomplete trial record? We think not, and therefore make known to this Court through our Amicus Brief, information which, in our opinion, the dictates of justice require.

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[10]We are unable to see firm guidelines for justice in "national standards" review. How can this Court weigh in the balance a multitude of facts which it is impossible to lay before it? Justice Brennan's opinion accepted the testimony that the film was shown in "approximately 100 of the largest cities" as evidence of a standard. Does the failure to prosecute in a particular city enumerate an actual standard, or does it indict the prosecutor for failure to allow the community to express its standard? It is our opinion that this Court's decisions in prior restraint cases have broken the spirit of the prosecutors throughout the nation in this area. (Amicus Brief, page 51.) Does this make obscene material appearing on the markets today "acceptable to national standards"? Who can say that a different version of the film was not shown? It is known in the trade that different versions are exhibited at different theatres based upon the degree of law enforcement to be expected. A film "Olga's Girls" shown at the same time in Los Angeles County at two different theaters owned by the same person had two different versions. A number of objectionable scenes were cut from the version shown in county territory but remained in the version shown in city territory. The apparent reason: The county territory was within the jurisdiction of the District Attorney who had indicated a complete willingness to take such matters to court. In another instance a motion picture film "Olga's House of Shame" and its director were indicted in Oregon. At the extradition hearing in New York, the director argued to the judge that he should not be extradicted because the film had been licensed in New York. It was necessary for an aggressive Portland District Attorney to bring the indicated film to New York to show that the Portland exhibition had 18 scenes which did not appear in the version which was licensed by New York.

II.

The Roth Test Defines a Balance Between the Rights of an Individual and the Rights of the Community. Its Application to Given Subject Matter or Conduct Necessarily Involves a "Balancing" Operation.

Appellant takes issue (Supplemental Brief, p. 7) with the "balancing" concept expressed by the reporter's comment in the A.L.I. Model Penal Code (1957 Draft) and makes the following statements in argument:

> ". . . The Roth and Alberts opinion finds the constitutional justification for anti-obscenity statutes, in the light of the prohibitions contained in the First Amendment, in the fact that only material that is utterly without *redeeming* social importance is affected. Beyond this such statutes may not go without contravening the guaranties. *This leaves no room for the kind of balancing that the quoted statements advocate. . . .*"

To *amicus curiae* C.D.L., the above language itself appears self-defeating to Appellant's cause. We cannot see how one can fail to expect a *balancing* process of some sort, when one considers, as Appellant is willing to acknowledge, that under the *Roth* decision, the spotlight is cast upon the "redeeming"[11] quality of the social importance. The word "redeem", by its nature suggests a balancing operation. As applied to qualities

[11]"Slight" social importance is not enough here. To escape suppression, it must be ' redeeming" social importance.

and actions, the verb "redeem" is defined in Oxford Universal Dictionary by Rand McNally and Company as:

> "10. Of qualities, action, etc.: To make up for, compensate for, *counterbalance* (some defect or fault) . . .b. To save (a person or a thing) from some defect or blot." (Our emphasis.)

How can one establish the point of "counterbalance" unless one does match the compensating quality (social importance—First Amendment) against the negative defects (pruriency—Ninth and Tenth Amendments)?

Appellant continues (Supplemental Brief, p. 7) that the "balancing" concept which is explained in the reporter's comments to the A.L.I. Model Penal Code (1957 draft) and cited by Amicus Curiae C.D.L. (Amicus Brief, pp. 76-78) are the "views of that individual, put forth prior to Roth and Alberts," and "are views inconsistent with the decision in those cases (Roth and Alberts). . . ." But this simply is not a correct statement of the law as it appears! Certainly there is no case holding to that effect, and we read the Roth-Alberts decision to indicate a contrary position. The position of *amicus curiae* C.D.L. (Amicus Brief, p. 75) is that the 1957 draft and the reporter's comments thereon are a codification of prior case law which this Court has not departed from.[12] One statement of the balancing rule was expressed by Justice Learned Hand in *United States v. Levine*, 83 F. 2d 156, 158, as:

> "The standard must be the likelihood that the work will so much arouse the salacity of the reader

[12]In this regard, Appellant does not attempt to reconcile the view of prior case law with his interpretation of Roth-Alberts.

> to whom it is sent *as to outweigh* any literary, scientific, or other merits it may have in that reader's hands; of this the jury is the arbiter. . . ." (Our emphasis.)

Similarly, in *Walker v. Popenoe,* 149 F. 2d 511, 512, the Court of Appeals considered the same balancing test, in ruling certain matter not to be within the range of a jury question. The *Popenoe* court held that a finding of obscenity by a jury *under the balancing test expressed in Levine* could not be supported, and dismissed the charge. As the A.L.I. reporter explains in his comments at page 29 *et seq.,* both the question of law for the court (if there be one) and the question of fact for the jury (if there be one) involves this "balancing" test.

There is no indication, as claimed by Appellant, that this Court in *Roth-Alberts* meant to depart from the "balancing" rule expressed in prior case law.[13] On the contrary this Court in *Roth-Alberts* cited with approval the very statement of the reporter relied on by Amicus Curiae C.D.L. (Amicus Brief, p. 76 *et seq.*). See *Roth-Alberts* at page 487, fn. 20, where this Court noted:

> "We perceive no significant difference between the meaning of obscenity involved in the case law and the definition of the American Law Institute Model Penal Code, Section 207.10 (2) (Tentative Draft No. 6, 1957). . . . *See . . . the discussion at page 29 et seq. . . .*" (Our emphasis.)

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[13]Both Levine and Popenoe were cited with approval in *Roth* at page 489, fn. 26.

The reporter's discussion at page 30 read in part:

> "Policy as well as constitutional limitations enjoin us to safeguard freedom of expression by *balancing* artistic or other merits of a work against the alleged prurient appeal. . . ." (Our emphasis.)

Our brief does not go so far as to say that testimony by "literateurs" is not pertinent, as claimed by Appellant (Supplemental Brief, p. 9). Our position is that such testimony is relevant, but because of the "balancing" concept, it is not controlling. Appellant of course has a different view, since it does not believe in the balancing concept. The testimony referred to was limited to opinion testimony on whether the book had merit. Those witnesses offered no testimony, whatsoever on the "effect of the book, considered as a whole upon all those whom it is likely to reach", and their testimony, such as it was, could only be weighed in the balance.

Because our brief (Amicus Brief, p. 85) assesses Fanny Hill in a different manner than that urged by Appellant's experts, Appellant broadly assumes (Supplemental Brief, p. 10) that "There is an implication here that the 'literateurs' are biased", also "that the person who may testify as to the literary value of any challenged work will be biased." The former assumption is incorrect. We are sure, as did happen in this case in the testimony of John E. Collins, that there are "literateurs" who will testify to exactly the opposite of the Appellant's witnesses in this case. The latter assumption, as applied to the facts of this case, we are less reluctant to disagree with. Our experience has shown that there are those who will testify in a manner which is necessarily biased because of personal philosophical inclina-

tions. There is many a writer, critic and reviewer today who entertains no regard for the obscenity laws of this nation, and to whom, it might justly be commented, nothing is obscene. District Judge Fox had occasion to comment on this recently in a case involving the paperback book "Sex Life of a Cop" in *United States v. West Coast News,* 228 F. Supp. 171 (Mar. 25, 1964) at page 189. He concluded by saying at page 190:

> "In this case, by giving defendants more protection than they were entitled to under the law, the jury heard *advocates* and not *experts.* These advocates attempt to make straight the way for the free flow of obscenity.
>
> "Witness Kirsch was an advocate of his special interests as an editor of the books section for the Los Angeles Times. . . . His opinion was clearly influenced by his personal, academic, economic and philosophical interests. . . ."

James Jackson Kilpatrick, editor of the Richmond News Leader, had similar comments to make in his book, "The Smut Peddlers" at page 39, regarding the testimony of the same Los Angeles book editor in a California trial involving the same publication and the paperbook book "Rambling Maids".

Appellant, in addressing itself to this Court's concern over the heavy burden occasioned by the increasing number of obscenity cases appearing on the dockets suggests that the burden may be lessened if this Court applies an independent test of "social value" (Supplemental Brief, pp. 12-13), and rejects the balancing concept. The brief refers to cases mentioned in C.D.L.'s Amicus Brief at pages 41 *et seq.* under the heading "A Major National Problem" and states: "The instances

cited by C.D.L. are examples of the capacity of lower courts and prosecutors *to follow a course pointed out by this Court.*" (Our emphasis.) This, of course, brings the opposing contentions into focus. Appellant says the lower courts are following this Court's direction; we say that the lower courts are misinterpreting this Court's direction. Appellant cites the decision of the Supreme Court of Illinois in *People v. Bruce,* 31 Ill. 2d 459, 202 N.E. 2d 497, reversing a jury verdict and its own prior judgment finding Lenny Bruce guilty under the Illinois obscenity laws, as an example of a state court's ability to "follow a course pointed out by this Court." It is true that the Illinois Supreme Court in *People v. Bruce* (*supra*), wrote an opinion upholding contentions similar to those of the Appellant. In that case, the majority opinion (Justice Schaefer concurred in the result) noted that it had, in an early opinion in the same case, rejected the defendant's arguments that the *Roth* case, struck down the "balancing test" which was ruling case law in *American Civil Liberties Union v. City of Chicago,* 3 Ill. 2d 334, 121 N.E. 2d 585. The *Civil Liberties* case held at page 498 that:

> "The obscene portions of the material must be balancing against its affirmative values to determine which predominates. . . ."

Someone apparently failed to point out to the Illinois Supreme Court that the *Civil Liberties* case had been cited with approval by this Court in *Roth* at footnote 26. Following the *Jacobellis* decision, the Illinois Supreme Court reversed its previous ruling, giving as its *sole* reason, at page 498:

> "It is apparent from the opinions of a majority of the court in Jacobellis that the 'balancing test'

> rule of American Civil Liberties Union is no longer a constitutional acceptable method of determining whether material is obscene, and it is there made clear that material having *any* social importance is constitutionally protected."

The Illinois Supreme Court was led into accepting a rule of law it would not otherwise have adopted, at page 498:

> ". . . we would not have thought that constitutional guarantees necessitate the subjection of society to the gradual deterioration of its moral fabric which this type of presentation promotes. . . ."

Mr. Lenny Bruce, however, did not fare as well with his arguments in the New York Courts in *People v. Bruce,* New York Criminal Court Docket No. A4406, 1964. In that criminal action in New York City he was found guilty of using obscene words in his night club act. On a petition for certiorari, this Court refused to consider his case during the October Term 1964. It is our view that the Illinois Supreme Court was led into error by the result reached in *Grove Press, Inc. v. Gerstein,* 378 U.S. 577, 84 S. Ct. 1909, 12 L. Ed. 2d 1035, and the Jacobellis "no clear majority" decision, and had it understood that this Court was going to deny certiorari in the New York conviction of Lenny Bruce, it would not have reversed the Illinois jury conviction and its own judgment to the contrary in the Illinois *Bruce* case.

To Appellant, "The Appendix to the C.D.L. brief constitutes a general perversion of the work it purports to summarize" (Supplemental Brief, p. 4). We ad-

mit that no attempt was made to couch the language in Old English, and in this respect perhaps the summary might be looked upon by an "unsympathetic literateur" as a "perversion". We do believe, however, that it succeeds without difficulty in pointing out that the dominant theme of the material taken as a whole is an appeal to prurient interest. Under our theory of a "balancing" test this is important—Appellant thinks otherwise.

III.

The Rationale in Curl's Case Is a Fundamental Part of Our Law. The Maintenance of High Public Morality Is a Proper Concern of Government.

Appellant's unwillingness to accept the "balancing" concept is the natural consequence of Appellant's refusal to give recognition to a *second and equally important constitutional right* which is involved here—the police power of state government, as guaranteed by the Ninth and Tenth Amendments, first enunciated in the English Common Law with respect to sexual morality (obscenity) in *Rex v. Curl* (1727) 2 Strange 788. Appellant argues: "By the end of the century our Constitution had explicitly rejected the ideas that prevailed in Curl's case." (Supplemental Brief, p. 14) and ". . . it is no part of our concept of government" (Supplemental Brief, p. 2), and finds fault (Supplemental Brief, p. 2) with the theory "that standards of conduct—specifically, standards of sexual morality—can be preserved by forbidding certain kinds of speech and writing, that the preferred sexual morality ought to be preserved by such means, and that it is the business of government to do so. . . ."

We were of the opinion that *Roth-Alberts* had answered both of Appellant's arguments to the contrary.[14]

In support of its argument that the ideas that prevailed in *Curl's* case had been rejected, Appellant quotes (Supplemental Brief, p. 14) at length the argument of the King's Attorney General which appears in *Curl's* case, but omits from the Attorney General's quotation the very portion which explains the rationale and establishes the rule of *Curl's* case, namely:[15]

> "I do not insist that every immoral act is indictable, such as telling a lie, or the like; but if it is destructive of morality in general, if it does, or may, affect all the King's subjects, it then is an offense of a public nature. And upon this distinction it is, that particular acts of fornication are not punishable in the Temporal Courts, and bawdy-houses are. In Sir Charles Sedley's case it was said, that this Court is the custos mores of the King's subjects. 1 Sid. 168."

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[14]At page 482:

> "The guarantees of freedom of expression in effect in ten of the fourteen States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes. As early as 1712, Massachusetts made it criminal to punish 'any filthy, obscene, or profane song, pamphlet, libel or mock sermon,' in imitation or mimicking of religious services. Acts and Laws of the Province of Massachusetts Bay, Chapter CV, Section 8 (1712), Massachusetts Bay Colony Charters and Laws, 399 (1814). Thus, profanity and obscenity were related offenses. . . ."

[15]Compare C.D.L.'s citation of the Attorney General's quotation on morality (Amicus Brief, p. 57, fn. 23) with the same quotation, cited by Appellant (Supplemental Brief, p. 14). The three asterisks appearing on the latter page indicate the position where the portion noted above, and omitted by Appellant, should appear.

In failing to address its reply to that portion of the argument of the King's Attorney General which explained the rationale of the police power, Appellant has said nothing which disturbs the merits of *Curl's* case. What the King's Attorney General said in 1727, is equally true today. Contrary to Appellant's contentions, Curl's rationale is one of the cornerstones of our constitutional government. While private acts of fornication may be treated by government as a matter of private morals, a house or trade dealing in fornication is universally treated by government as a matter of public morals and a proper subject for criminal laws. While our man-made law does not prohibit every moral evil, it does nevertheless, contrary to the position taken by Appellant in its Supplemental Brief, address itself to the purpose of maintaining high *public* morality.[16]

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[16]In 1874 Justice Swayne, speaking for a unanimous United States Supreme Court in *Trist v. Child*, 21 Wallace 441, 450 (1874), said:

> "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of history. . . ."

Concerning the power of government to regulate matters relating to *public morals* and power to say what is offensive to *public morality*, the United States Supreme Court said, in 1887:

> ". . . The power to determine such questions (what is offensive to public morality) so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of many, provided only they are permitted to do as they please. Under our system, *that power is lodged in the legislative branch of the government*. It belongs to that department to exert what are known as police powers of the state, *and to determine primarily, what measures are appropriate or needful for the protection of the public morals*, the public health, or the public safety. . . ." (Our emphasis.)

C.D.L. views with a great deal of sadness the fact that the members of this High Court, with few exception, have failed in

In the opinion of *amicus,* there is no question as to the validity of Curl's rationale regarding the role of government in maintaining the public morals.

Appellant argues (Supplemental Brief, p. 2) regarding the Curl's rationale, "It is explicitly rejected by the First Amendment and, apart from the First Amendment itself, it is thoroughly inconsistent with the genius of our Constitution. (*Kingsley International Pictures Corporation v. Regents,* 360 U.S. 684.)" We do not understand this as being a proper statement of the law. (See *Amicus* Brief, p. 66, *et seq.* and our comments on the *Kingsley* case at p. 68, fn. 37).

Appellant, in further argument against the *Curl* case rationale (Supplemental Brief, p. 2) takes issue with "The notion that art and literature should be subjugated to this elusive goal . . ." We have said something on this score in another regard (Amicus Brief, p. 84). A more judicial reply however is found in the majority opinion of Justice Burke of the Court of Appeal of New York in *Trans-Lux Distributing Corporation v. Regents,* 14 N.Y. 2d 88, 248 N.Y.S. 2d 857-863:

> "To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding policy against

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their opinions to speak with nobility on this paramount right of government to speak through the jury system on matters relating to sexual morality. It is our opinion that, as in time of Curl, it would take but one small direction from this Court to start the trend in community morals swinging in the opposite direction (the direction of public decency). See also Amicus Brief, p. 69, fn. 39. In this regard, we feel this Court is lagging the needs of its people.

pornographic displays. Since no other profession is privileged to bend public morals, policy and law to its internal craft standards, then neither should producers of films. . . ."

IV.

The Determination of Obscenity Is Primarily a Jury Question.

Appellant deprecates (Supplemental Brief, pp. 8, 9) C.D.L.'s view that the determination of the question of freedom of expression in the sexual area is largely a jury question. It has no difficulty however at the same time in viewing "The right to jury trial" as "an important right to a defendant." Says Appellant "To leave the matter of whether given speech or writing is entitled to constitutional protection in the hands of jurors, on the theory that they represent a community consensus, is to make the application of the First Amendment turn on soundings of prevailing sentiment. It changes a constitutional provision designed for the protection of minority expression into a weapon for the enforcement of majority views." But why shouldn't the People also have the right to a jury trial on issues which relate to the police powers of government, and which will affect community moral standards.[17] In History of the English Law, by Pollack and Maitland, the authors identify the jury with the community:

> "The verdict of the jurors is not just the verdict of twelve men; it is the verdict of a pays, a 'country', a neighborhood, a community . . . The voice of the twelve men is deemed to be the voice of the countryside, often the voice of some hundred

[17]See Amicus Brief, pages 74, 75 and fottnotes 43, 44.

> or other districts which is more than a district, which is a community. The royal justices seem to feel that if they analyze the verdict, they would miss the very thing for which they are looking, the opinion of the country. . . ."

The people of the American Colonies claimed the right of trial by jury as their most prized possession as Englishmen. Its deprivation in many cases was listed in the Declaration of Independence as one of the grievances against the Crown. At Common Law and under the early American decision, it was universally held that the accused in a criminal prosecution could not waive jury trial in any case. The question is often asked in obscenity cases, "Who are the experts on 'pruriency'." The answer is, and should be—the community, speaking through the jury, acting as an "ad hoc" legislative body.

Appellant puts forth the view (Supplemental Brief, p. 5) that the author Cleland in Fanny Hill "argues that knowledge about vice strengthens character"[18] and that "Whether Pope's idea or Cleland's is the more valid is a matter of debate, but that conflicting ideas should be given full hearing is a prime concern of the First Amendment. . . ." We submit however that Appellant as the publisher of Fanny Hill wants nothing like the "full hearing" he is entitled to under our system of law.[19] The obscenity laws of Massachusetts provided

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[18]Appellant's authority for this proposition is the last page of the 214 page text. We calculate this ingredient to constitute considerably less than 1% by volume.

[19]"Defendant invariably recoils in horror at any suggestion that the question of obscenity be submitted to a jury. This leads one to question his sincerity for there is no better way of determining community standards of morality than the time-tested

Appellant with the most ideal forum in which to present his conflicting ideals for a full hearing—a jury of representative members of the community. This right was waived at the outset.

V.

A State's Determination Presents No Problem of Prior Restraint.

Appellant, replying to C.D.L.'s arguments that the distribution of Fanny Hill should not be forced upon a state against that state's contrary determination under its exercise of the police power of that state (Supplemental Brief, pp. 11, 12) paints a colorful picture of economic confusion which is supposed to result if a state is to be permitted to make its own determination: "The author may live in one state, the publisher operate in another, and the manufacturer of the book take place in a third". The distributor outlets cover many states. The pubisher, distributors etc. must have a business guarantee, says Appellant, else it will not publish, distribute etc.[20] Next, Appellant argues the oft re-

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method of trial by jury. . . ." Bromberg, Five Tests for Obscenity, 41 Chicago Bar Record 416, 418 (1960).

"Are they not telling the justices that they believe they can prevail only if the community standard is *not* applied? The Court hasn't gotten the message. . . ." XL Notre Dame Lawyer, No. 1, 10 (December 1964).

[20]Appellant's arguments do however demonstrate why state controls are not enough and why the federal police power is an indispensable necessity to the control of obscenity. The federal powers of nationwide investigations, subpoena and extradition are needed. How can the state powers effectively meet the problem when the police power cannot reach the parties involved in the transaction—cannot strike at the really culpable source of manufacture, which is without. It is a recognized fact that publishers locate themselves in the liberal jurisdictions and take sanctuary in the relatively low risk of state prosecution. State prosecution without their jurisdiction gives them little worry. The state ac-

peated cliche. "This, of course, constitutes the most prior of prior restraints." As a practical matter, how difficult is it to get a paperback published and distributed today? The fact is, there is no difficulty, and the opposite is true. The volume of obscene paperbacks on the market today indicates there are no end of people who will act as publishers and manufacturers and distributors. These publishers and distributors require no guarantee—they operate on credit and their ability to "beat the law". We submit that an affirmation of the state court judgment will have the overall effect of nullifying the "anything goes" attitude which exists in certain segments of the industry, which in turn will restore an attitude of responsibility which the obscenity laws require of all publishers. We are sure that this nation will have much to gain if Appellant will but continue to devote its energies to the type of publications represented by the catalogs which appear in the Appendix to Appellant's Supplemental Brief, and will retreat from its attempt to prove that the rights of a publisher *under all circumstances* are paramount to the police right of community government.

Respectfully submitted,

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tion has heretofore been largely against the retailer. In most states the obscenity crime is a misdemeanor and extradition for a misdemeanor, generally is not practicable. C.D.L. is in the hopes that Justice Harlan recognizes this national dilemma and will retreat from his view that the federal police powers and federal juries are not equally involved.